
**State Government Operations &
Accountability Committee**

HB 1673

Brief Description: Reducing the regulatory burden for Washington businesses.

Sponsors: Representatives Clements, Armstrong, Dunn, Newhouse, Serben, McDonald, Anderson, Ahern, Condotta, Curtis, McCune, Alexander, Bailey, Cox, Hinkle, Shabro, Rodne, Holmquist, Schindler, Skinner, Buck, Kretz, Priest, Orcutt, Ericksen, Haler, Woods, Kristiansen, Strow, Crouse, Pearson and Talcott.

Brief Summary of Bill

- Requires the authority the Legislature delegates to agencies for rulemaking to be construed narrowly.
- Prohibits agencies from adopting rules unless they are derived from specific grants of legislative authority.
- Requires the Governor to sign all administrative rules.
- Creates the Office of Regulatory Reform to help oversee agency rulemaking.
- Delays the effective date of significant legislative rules until after one legislative session has passed.
- Expands the counties in which a challenge to an agency action may be filed in superior court.
- Changes the burden of proof in actions challenging the validity of an agency action.

Hearing Date: 2/16/05

Staff: Jim Morishima (786-7191).

Background:

I. Rulemaking in General

Agency rulemaking is a quasi-legislative function; agencies are only able to engage in rulemaking when delegated the authority to do so from the Legislature. An agency generally may not rely

solely on the section of law stating a statute's intent or purpose, or on the enabling provisions establishing the agency for its statutory authority to adopt a rule.

II. Oversight of Agency Rulemaking

There are several ways agency rulemaking is overseen. For example, the Office of Regulatory Assistance within the Office of Financial Management operates a web site that contains information on federal, state, and local rulemaking requirements.

The Legislature exercises oversight over agency rulemaking through the Joint Administrative Rules Review Committee (JARRC). The JARRC is empowered to examine three main issues: Whether a rule is consistent with the intent of the Legislature, whether a rule was adopted in accordance with the law, and whether an agency is using a policy or interpretive statement in place of a rule. The JARRC may also, by majority vote, order an agency to engage in the significant legislative rulemaking process or develop a small business economic impact statement.

If the JARRC issues an adverse finding on a rule, the agency in question is required to conduct a hearing on the committee's findings. If the JARRC is dissatisfied with the agency response to its findings, it may publish notice of its dissatisfaction in the State Register, recommend to the Governor that he or she suspend the rule, or refer the matter to a standing policy committee of the Legislature.

III. Judicial Review of Agency Rulemaking

A person may bring an action in Thurston County Superior Court challenging the validity of an agency action. In such a suit, the person challenging the agency action has the burden of proving the agency action was invalid.

IV. Significant Legislative Rules

A significant legislative rule is a rule that:

- Adopts substantive provisions of law that subject a violator to a penalty or sanction.
- Establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or
- Adopts or amends a new policy or regulatory program.

The following agencies must engage in a special rulemaking process when adopting significant legislative rules: The Department of Ecology, the Department of Labor and Industries, the Department of Health, the Department of Revenue, the Department of Social and Health Services, the Department of Natural Resources, the Employment Security Department, the Forest Practices Board, the Office of the Insurance Commissioner, and the Department of Fish and Wildlife. The significant legislative rule making process imposes requirements in addition to the "regular" rule making process such as requiring the agency to determine that the rule is really needed in order to achieve the rule's goals and requiring the agency to perform a cost-benefit analysis.

An agency that is not required to follow this process for its significant legislative rules may do so on its own initiative.

Summary of Bill:

I. Rulemaking

When delegating authority to an agency through legislation, the Legislature, unless it specifically states otherwise, limits its delegation to the minimum delegation necessary to administer the legislation's clear and unambiguous directives and the administration of circumstances and behaviors foreseeable at the time of the legislation's enactment. Agencies may only adopt rules derived from a specific grant of legislative authority. Agency rules must list the specific statutory section or sections from which the grant of authority is derived and may not rely solely on a section of law stating the statute's intent or purpose or the general enabling provisions establishing the agency

The order of adoption for every rule adopted by an agency must contain the signature of the Governor.

II. Oversight of Agency Rulemaking

The Office of Regulatory Reform (ORR) is created in the executive branch. The ORR's responsibilities include:

- To provide oversight of the agency regulatory process through the review of proposed and existing rules;
- To encourage agencies to eliminate, consolidate, simplify, expedite, or improve permits, permitting procedures, and paperwork burdens affecting business and local government undertakings;
- To offer permit assistance to businesses and local governments;
- To analyze the impact of proposed and existing rules on matters such as the public health, safety, and welfare, and job creation, and make recommendations for simplifying the rules and regulatory processes.
- To require a cost-benefit analysis, risk assessment, or an analysis of an existing or proposed rule's effect on the creation or retention of jobs;
- To require that cost-benefit analyses or risk assessments be peer reviewed;
- To issue determinations regarding whether any action taken by an agency should be taken pursuant to a rule;
- To request an agency engaging in rulemaking to initiate a policy dialogue with interested parties or engage in negotiated rulemaking;
- To request an agency to consider the amendment or repeal of a rule that may be obsolete, harmful to the economy, or excessive in light of state or federal statutes, rules, or regulations;
- To recommend to the Governor, the Attorney General, and the Director of Financial Management that any agency be directed to amend or repeal any rule; and
- To exclude certain rules or certain categories of rules from certain rulemaking procedures.

Before submitting a notice of proposed rulemaking, an agency must submit information to the ORR, including the complete text of the proposed rule, any regulatory impact statement, and any cost-benefit analysis, risk assessment, analysis of the rule's effect on the creation and retention of jobs, or the results of negotiated rulemaking undertaken in conjunction with the development of the rule. The ORR must evaluate the submission and determine whether it is complete.

If the submission is deemed to be complete, the ORR must submit the submission with a recommendation to the Governor, the Attorney General, and the Office of Financial Management

for approval or disapproval. The Governor, the Attorney General, or the Office of Financial Management may: Authorize the submission of the proposed rule, prohibit the agency from proposing the rule unless specified changes are made, or prohibit the agency from proposing the rule.

If the submission is deemed to be incomplete, the ORR must return the submission to the agency with direction to amend or prepare a regulatory impact analysis, cost-benefit analysis, risk assessment, or analysis of the rule's effect on the creation and retention of jobs in the state; or engage in a negotiated rulemaking process.

When the agency submits a notice of rulemaking to the Code Reviser under the Administrative Procedures Act, it must also submit the notice and attendant materials to the ORR. The ORR must then evaluate each rule to determine whether the rule:

- Is clearly within the authority delegated by law;
- Is consistent with and necessary to achieve a specific legislative purpose;
- Is clearly written so that its meaning will be easily understood by persons affected by the rule;
- Is not duplicative;
- Is consistent with existing statutes and rules;
- Will produce benefits that outweigh the costs;
- Does not impose an unfunded mandate on local governments;
- Prescribes methodologies or requirements that allow regulated parties flexibility and encourage innovation in meeting the legislative or administrative requirements and objectives underlying the statute or rule;
- Gives preference to the least costly, least burdensome regulatory and paperwork requirements needed to accomplish legislative and administrative objectives;
- Is based on the best scientific, technical, and economic information that can be obtained in a reasonable and affordable manner; and
- Favors market-oriented solutions and performance standards over command-and-control regulation.

If the ORR determines that the rule does not meet the aforementioned criteria, it may notify the agency within 45 days for proposed rulemaking or 30 days for revised rulemaking. The notice must indicate that the agency may not adopt the rule sooner than 30 days after it responds in writing to the director. If the ORR has already pre-approved the submission of the rule, it may only disapprove of the submission upon a finding of changed circumstances or new information.

After receiving notice from the ORR, the agency may withdraw the proposal, provide the ORR with further clarification or justification of the rule or the regulatory impact statement, propose changes to the rule, or state that it will revise its submission. After the agency responds, the ORR may notify the agency not to adopt the proposed or revised rule on a temporary basis.

If the ORR issues notice that a rule does not meet the criteria mentioned above, the ORR must promptly notify the Governor, the Attorney General, and the Office of Financial Management. After consideration of the ORR's determination and any information presented by the agency, the Governor, the Attorney General, and the Office of the Financial Management may confirm or modify the ORR's determination or authorize the agency to adopt the rule in whole or in part.

III. Judicial Review of Agency Rulemaking

A person may bring an action challenging the validity of an agency action in the superior court of Thurston County, the county of the petitioner's residence or principal place of business, or in a county where property owned by the petitioner and affected by a contested rule is located. In such an suit, the agency bears the burden of demonstrating that its action was authorized by law. When determining the validity of a rule, the court must consider whether the agency has exceeded the Legislature's delegation of the minimum delegation necessary to administer its legislation's clear and unambiguous directives and the administration of circumstances and behaviors foreseeable at the time of the legislation's enactment.

IV. Significant Legislative Rules

Significant legislative rules must be adopted prior to December 1 of any year. Such rules may not take effect until the end of the regular legislative session in the following year. After adopting a significant legislative rule regulating the same activity or subject matter as another provision of state or federal law, the agency must provide the ORR a list citing by reference the other federal and state laws.

Appropriation: None.

Fiscal Note: Requested on February 10, 2005.

Effective Date: The bill contains an emergency clause and takes effect immediately.